

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align:right">Complainant,</p> <p style="text-align:center">v.</p> <p>QWEST CORPORATION AND MCI WORLDCOM COMMUNICATIONS, INC.,</p> <p style="text-align:right">Respondents.</p>	<p>DOCKET NO. FCU-02-5 (C-02-22)</p>
---	--

ORDER REGARDING BANKRUPTCY STAY

(Issued August 22, 2002)

On August 7, 2002, WorldCom, Inc. (WorldCom)¹ filed notice with the Utilities Board (Board) that it had filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the U.S. Bankruptcy Code, and asserted that any further proceedings in this action were stayed pursuant to 11 U.S.C. § 362.

On August 8, 2002, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a response to WorldCom's notice, asserting that this action falls under the exception to the automatic stay provision contained in 11 U.S.C. § 362(b)(4) because it is "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police

and regulatory power" The Consumer Advocate asserted that this action was brought by it pursuant to Iowa's anti-slamming statute on behalf of consumers generally and the public generally for the purpose of determining whether the statute was violated, and if so, for the further purpose of determining needed remedies, including civil monetary penalties if appropriate. The Consumer Advocate asserted that scores of cases support the applicability of the exception to such actions.

On August 12, 2002, WorldCom filed a reply to the Consumer Advocate's response, stated this case does not fall within the exception to the stay, and if there is any doubt, the Board and Consumer Advocate should resolve the issue with the Bankruptcy Court. WorldCom also argued that even if the exception to the stay applies, enforcement of civil penalties is stayed, and the Board should use its own authority to stay the case. WorldCom asserted that the exceptions to the automatic stay provisions are to be read narrowly (See In re Medicar Ambulance Co., Inc., 166 B.R. 918, 926 (B.R. N.D. Cal., 1994)), and that the automatic stay should be read broadly to give WorldCom "breathing room" to reorganize. It further asserted the case fails the pecuniary interest test and the public policy test, because the Consumer Advocate is merely advocating on behalf of a single private party, and it appears the sole purpose of bringing the complaint is to obtain civil

¹ In previous filings and orders, WorldCom was referred to as MCI WorldCom Communications, Inc. Since the utility refers to itself as WorldCom, Inc. in this filing, we will use the same name for consistency.

penalties. Finally, WorldCom took no position as to whether the case should be stayed with respect to Qwest.

A review of the case law supports the Consumer Advocate's position that this action falls within the exception to the automatic stay provided in 11 U.S.C. § 362(b)(4). "The legislative history of this section indicates that when a debtor is sued by a governmental unit in order 'to prevent or stop violation of fraud, environmental protection, *consumer protection*, safety, or similar police or regulatory laws, *or attempting to fix damages for violation* of such a law, the action or proceeding is not stayed under the automatic stay. . . . By allowing such actions to proceed, this exemption prevents the bankruptcy court from becoming 'a haven for wrongdoers'." In re First Alliance Mortgage Co., 263 B.R. 99, 107 (9th Cir. BAP 2001), citing H.R.Rep No. 595, 95th Cong., 1st Sess. 343 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6299 (emphasis added); and In re Berg, 198 B.R. 557 (9th Cir. BAP 1996). *See also*, E.E.O.C. v. Rath Packing Co., 787 F.2d 318, 324 (8th Cir. 1996).

However, not all police or regulatory actions are exempt. "Enforcement of laws that affect health, welfare, morals, and safety will not be stayed, but regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court will be stayed." In re First Alliance, 263 B.R. at 107, *citing* In re Universal Life Church, Inc., 128 F.3d 1294, 1297 (9th Cir. 1997). The courts distinguish between suits to enforce police and regulatory powers, including entry of injunctive or monetary judgments, which are not stayed, and those to enforce a monetary

judgment, which are stayed. Board of Governors v. MCorp. Financial, 502 U.S. 32 (1991); In re First Alliance, supra; E.E.O.C. v. McLean Trucking Co., 834 F.2d 398 (4th Cir. 1987).

The Ninth Circuit applies two tests to determine whether a state's actions fall within the scope of § 362(b)(4). The first is the "pecuniary purpose" test. In re First Alliance, supra. The second is the "public policy" test. Id.

"Under the 'pecuniary purpose' test, the court must determine 'whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of public safety and welfare.'" Id., citing In re Universal Life Church, 128 F.3d at 1297. "The relevant inquiry is whether the action is being pursued 'solely to advance a pecuniary interest of the governmental unit,' in which case the stay will be imposed." Id.

The application of the "public policy" test is designed to "distinguish between government actions that effectuate public policy and those that adjudicate private rights." Id., at 108. "'Where the agency's action concerns only the parties who are immediately affected the debtor is entitled to the same protection it would receive under the automatic stay if the proceeding were instead in a judicial forum.'" Id., citing In re Charter First Mortgage, Inc., 42 B.R. 380, 384 (Bankr.D. Or. 1984). "In applying the public policy test, a court must determine whether the action is an attempt to prevent future violations of the law rather than an attempt to determine the liability of private parties." In re Medicar Ambulance Co., Inc., 166 B.R. 918, 927 (Bkrcty. N.D.Cal. 1994). "Thus, under the public policy test, an action to

revoke a contractor's license is allowed to proceed, despite the automatic stay, because it enforces a public policy. However, attempts to collect monies owed to persons harmed by the same incidents which caused the revocation proceedings enforce a private right, and thus violate the automatic stay." Id.

Contrary to the assertion of WorldCom, the Consumer Advocate is not functioning as an ombudsman solely for the Mark Seed Company. Although the informal complaint case was brought by the Mark Seed Company, this formal complaint case was brought by the Consumer Advocate, a governmental agency charged with investigating the legality of utility practices, bringing civil proceedings to correct any illegality, and representing the interests of consumers generally and the public generally. Iowa Code § 475A.2 (2001). The position of the Consumer Advocate in this case is analogous to that of the E.E.O.C. in the Rath case cited above. The portion of this case against WorldCom was brought pursuant to Iowa Code section 476.103, commonly known as Iowa's anti-slamming statute. The purpose of this statute is to protect consumers from unauthorized changes in telecommunications services. Utilities should not be able to avoid compliance with the anti-slamming statute when they file for bankruptcy protection.

Although the Consumer Advocate is requesting the Board to determine whether the imposition of civil penalties is appropriate, the purpose of civil penalties under section 476.103(4) is to deter telephone utilities from slamming customers, not to provide restitution to any particular consumer. If a civil penalty under this provision is collected, it must be forwarded to the state treasurer to be credited to

the general fund and used only for consumer education programs administered by the Board. Furthermore, it is completely unknown at this point in the proceeding whether WorldCom violated § 476.103, and even if it did, whether civil penalties are appropriate.

Therefore, under either the "pecuniary interest" test or the "public policy" test, this case falls within the exception in 11 U.S.C. § 362(b).

IT IS THEREFORE ORDERED:

1. This case is not stayed pursuant to the automatic stay under 11 U.S.C. § 362(a), because it falls within the exception provided in 11 U.S.C. § 362(b)(4).
2. The prior orders establishing the procedural schedule and notice of hearing issued on May 31, 2002, and July 17, 2002, remain in effect.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 22nd day of August, 2002.